IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 13TH JULY 2007 / 22ND ASHADHA 1929

SA.No. 326 of 1994()

AS.265/1992 of DISTRICT COURT, THALASSERY
OS.378/1991 of PRL.S.C.,THALASSERY
.....

APPELLANT/APPELLANT/PLAINTIFF:

KORUKKANTAVIDA SEETHA, RESIDING IN
PANUR AMSOM, ELANGODE DESOM,
THALASSERY TALUK

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENTS/RESPONDENTS/DEFENDANTS:
---

1. K.JAYAPRASAD, EMPLOYEE IN HINDUSTAN LIVER LTD.,
RESIDING IN 203, BIMAL APARTMENT,
CHULNA ROAD, BHALOOLA, VASAI (W),
THANA, BOMBAY

2. MOOSSA HAJI, BUSINESS MAN, RESIDING
AT THAYEYIL HOUSE, P.O.KADAVATHUR (VIA)
CHOKLI, THALASSERY TALUK

R1 & R2 BY ADV. SRI.V.R.VENKATAKRISHNAN (SR.)
SRI.S.ANANTHAKRISHNAN
SRI.N.C.JOSEPH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.326 OF 1994

Dated 13th July 2007

J U D G M E N T

Plaintiff in O.S.378 of 1991 on the file of Sub court, Thalassery is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for mandatory injunction directing first respondent to execute a sale deed in respect of 30 cents of plaint schedule property in her favour and for a permanent prohibitory injunction restraining first respondent from selling the property to second respondent. Plaint schedule property is 3 taks in Narangoli Thazha Ezhu kandam Nilam in survey No.22/1 B of Panur village. It admittedly originally belonged to Kanaran. Kumaran is the son of Kanaran. Kamala Bai is the wife of Kumaran. Appellant is the daughter of Kamala Bai in her second marriage. First respondent is the son of Kamala Bai in Kumaran. While dividing the properties belonging to Kanaran, under Ext.B1 partition deed dated 7/6/1970, plaint schedule property was allotted to the share of first respondent

and his mother Kamala Bai. Kamala Bai under Ext.B2, released her right in favour of first respondent. Thus first respondent is the absolute owner of plaint schedule property. According to appellant under Ext.A4 agreement, first respondent agreed to sell 30 cents of plaint schedule property in her favour for a total consideration of Rs.1,00,000/-. It was contended that mother Kamala Bai was having one room at Bombay and it was sold by first respondent for Rs.1,50,000/- and being her daughter appellant is entitled to Rs.75,000/-, out of that purchase price. It was also contended that when first respondent along with mother were residing at Bombay, plaint schedule property was entrusted to appellant providing that she is entitled to make improvements and value of improvements will be paid. According to appellant she effected value of improvements of Rs.25,000/-. According to appellant consideration of Rs.1,00,000/-due to first respondent under Ext.A4 is the amount due to her for being the consideration received by first respondent for the sale of the room and value of improvements effected by her in the plaint schedule property and first respondent agreed to sell the property under Ext.A4. First respondent

denied the case of sale of property at Bombay or any agreement or liability to pay improvements allegedly effected by appellant. It was therefore contended that appellant is not entitled to get any relief in the suit.

2. Learned Sub Judge on the evidence of PWs.1 to 3, Dws.1 to 3, Exts.A1 to A4 and B1 to B4 held that Ext.A4 agreement was not proved to be executed by first respondent. It was therefore held that appellant is not entitled to the decree sought for. Appellant challenged the decree and judgment before District court, Thalassery in A.S.265 of 1992. Learned District Judge on re-appreciating the evidence confirmed the findings of learned Sub Judge and dismissed the appeal. It is challenged in the second appeal.

3. Appeal was admitted formulating following substantial questions of law.

> 1) When the decision of a case entirely depends on a document with thumb impression, the identification of which is being an exact science, is not the court erred in not sending the document to a finger print expert for identification of the thumb impression.
>
> 2) When a definite piece of

evidence is available on record to decide the dispute did not the courts below erred in not adverting to such evidence and deciding the issue on its own impression of the signature and oral evidence.

4. Learned counsel appearing for appellant and first respondent were heard.

5. Admittedly plaint schedule property belonged to first respondent. Case of appellant is that Ext.A4 agreement was executed by first respondent whereunder after adjusting consideration of Rs.1,00,000/-, which is otherwise due to appellant, plaint schedule property was agreed to be sold. Learned Sub Judge on appreciating evidence found that execution of Ext.A4 agreement was not proved. Learned Additional District Judge re-appreciated the evidence and found that appreciation of evidence by trial court was proper and correct and evidence does not establish that Ext.A4 agreement was executed by first respondent. Argument of learned counsel appearing for appellant is that as Ext.A4 contains thumb impression, courts below should have sent Ext.A4 to an expert to find out whether thumb impression and signature

seen in Ext.A4 is that of first respondent. Appellant admittedly did not move her little finger to get the thumb impression and signature seen in Ext.A1 examined by an expert before the trial court. Appellant cannot find fault with the court for not sending Ext.A4 to an expert. If any of the parties want to seek the opinion of an expert, on the question of disputed signature or thumb impression, it is their duty to file an application to send it to the expert. As the appellant did not file an application to send Ext.A4 to an expert, it is not open to the appellant to contend that for non sending of Ext.A4 to an expert, the decree and judgment are to be interfered with. First appellate court reappreciated each items of evidence and found that execution of Ext.A4 was not proved. Courts below on appreciating documents and oral evidence found that case of appellant that there was a property at Bombay and that was sold and amount is due to appellant or appellant made improvements in the plaint schedule property and it was agreed to be repaid by first respondent are not proved or believable. Exercising the powers of this court under Section 100 of Code of Civil Procedure, evidence cannot be re-appreciated and finding of this

court cannot be substituted to that of courts below. Even if such an attempt is made, evidence do not warrant any other conclusion. In such circumstances, as there is no merit in the appeal, appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.326 OF 1994

13th JULY 2007

==========